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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SUSAN RADECKI, Individually and as Personal Representative of the Estate of Chester A. Radecki, Deceased, KRISTIN RADECKI, KERRY RADECKI, RENEE RADECKI and ROBERT RADECKI,

Petitioners,

vs.

RON BARELA, personally and in his official capacity and BENJIE MONTANO, personally and in his official capacity,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Did the United States Court of Appeals for the Tenth Circuit correctly apply *County of Sacramento v. Lewis*, __ U.S. __, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) in determining that a police officer, who had been suddenly assaulted by a suspect, did not violate the Fourteenth Amendment's guaranty of substantive due process by saying to a bystander holding a large flashlight, "Hit him with your flashlight. Hit him. Get him off me," while engaged in a life and death struggle with the suspect for control of the police officer's gun?

If such conduct by the police officer constituted a constitutional violation, was the law clearly established in August 1992 that a police officer's request for help from a bystander, when the officer is suddenly attacked by a suspect, would violate the constitutional rights of the bystander?

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Respondents respectfully pray that this Court deny the Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled action on June 24, 1998.

STATEMENT OF THE CASE

A. Background

Following this Court's recent articulation in *County of Sacramento v. Lewis*, __ U.S. __, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998), of the degree of culpability necessary to maintain a substantive due process claim, the Court of Appeals properly reversed the District Court's denial of Respondent Ron Barela's summary judgment motion based on qualified immunity in this action brought pursuant to 42 U.S.C. § 1983. The Court of Appeals determined that *Lewis*, which clarified the degree of culpability required to meet the conscience-shocking standard, controlled the resolution of the issues in this case. The Court of Appeals' decision conforms with this Court's decisions pertaining to substantive due process claims brought against governmental workers deployed in emergency situations. The Court of Appeals' decision also conforms with the application of *Lewis* by other circuits. The conflict alleged by Petitioner among the circuits existed prior to this Court's clarification of the law in *Lewis* and appears, to a large degree, to have been resolved by *Lewis*. As the law established in *Lewis* is clear and the Court of Appeals' application of *Lewis* was proper, the Petition should be denied.

B. Facts

Petitioners have misstated the facts of this case in at least four ways. First. although Deputy Barela requested Mr. Radecki to hit the suspect, Daniel Martinez, on the head, it is not known

whether he did so or not. The trial testimony of Eric Trujillo, the tow truck driver who had a clear view of the entire event and all participants, states that Mr. Radecki never hit Daniel Martinez with the flashlight. Deputy Barela also stated that Mr. Radecki never hit Daniel Martinez with the flashlight. Nevertheless, for purposes of Respondents' motion for summary judgment, Petitioners conceded that whether Mr. Radecki hit Daniel Martinez or not, "is not determinative of the outcome" of the summary judgment motion and Respondents were willing, *arguendo*, to accept Petitioners' allegation as true.[1] Both the Court of Appeals and the District Court in their recitation of the facts agreed that it was unclear whether Mr. Radecki hit Daniel Martinez with his flashlight.[2] App. 3a, 18a, and 31a. Second, Deputy Barela never used Mr. Radecki as a "human shield" as claimed by Petitioners in their Petition. Pet. 15. This assertion appears for the first time in the Petition and certainly, at best, is an exaggeration of the facts.

Third, Petitioners omit the fact that when he realized he was losing the fight and control of his weapon, Deputy Barela yelled at Mr. Radecki to run, thus affording a warning. Mr. Radecki was unrestrained and free to run. Unfortunately, he did not heed the warning. Finally, Petitioners in their "question presented" and argument give the impression that Deputy Barela

1. Issues of fact which are not material to the substantive claim do not preclude summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (only issues which "might affect the outcome of the suit under governing law" will preclude summary judgment).

2. For their contention that Mr. Radecki hit Daniel Martinez with the flashlight, Petitioners rely on the testimony of Leroy Padilla regarding a telephone conversation he had with Daniel Martinez some time after the event and the testimony of Susan Radecki who was not present at the scene. Padilla never clearly said Mr. Radecki hit Martinez, and his testimony is incompetent hearsay.

voluntarily surrendered his gun to Daniel Martinez. Daniel Martinez obtained Deputy Barela's gun only after jumping him suddenly and wrestling it away from him. It was during this fight for the control of the gun that Deputy Barela asked Mr. Radecki to hit Daniel Martinez on the head with the flashlight. Petitioners have recognized that Mr. Radecki was already in danger as a witness at a crime scene. Petitioners also have acknowledged that had Deputy Barela not spoken to Mr. Radecki at all, they clearly would have no constitutional claim.

Respondents incorporate by reference the Statement of the Facts set forth in the Court of Appeals Opinion below.

REASONS FOR DENYING THE WRIT

The decision below was a plainly correct application of *Lewis* and no conflict among the circuits currently exists.

I.

THE COURT OF APPEALS' DECISION PROPERLY APPLIES THE LAW OF *LEWIS*.

In arguing for the reversal of the Court of Appeals' decision, Petitioners also appear to be arguing for the reversal of *Lewis*. Petitioners quote extensively from the District Court's decision which was entered before *Lewis* was decided and, therefore, did not employ the analytical frame work set forth in *Lewis*. The District Court struggled to apply the "shock the conscience" standard to the facts of this case.

Realizing that under *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995), *cert. denied*, 516 U.S. 1118, 116 S. Ct. 924, 133 L. Ed. 2d 853 (1996), it needed to determine whether the conduct of Deputy Barela met the "shock the conscience"

standard, the District Court complained that the standard was amorphous, very difficult to apply, and subjective. App. 23a. The District Court wrote:

> It is fundamentally a factual inquiry: how outrageous was the defendant's conduct? Because it is so subjective, its application will change as one federal judge after another struggles to apply it. . . . The unpredictability of this test is compounded by the fact that my best measured (and yet idiosyncratic) judgment as a district judge may be summarily supplanted by the collective consciences and judgments of three (idiosyncratic) Tenth Circuit judges. Unfortunately, this amorphous and subjective standard easily lends itself to result-oriented decisions.

App. 23a (*citations omitted*). Without *Lewis* as a guide, the District Court equated the "shocks the conscience" standard with "despotic and tyrannical" behavior. App. 22a-23a. The only authority relied upon the District Court for its definition was *Black's Law Dictionary*, 104 (6th Ed. 1990). App. 23a. The District Court concluded that Deputy Barela's "conduct was despotic and tyrannical, and therefore, conscience shocking." App. 25a. In spite of finding the standard difficult to apply, the District Court also determined that the law was clearly established at the time. App. 25a-28a. The Court of Appeals reversed the District Court, holding that the conduct of Deputy Barela did not arise to the level of culpability required by *Lewis* to sustain a substantive due process claim.

In *Lewis*, the petitioners argued as the Petitioners argue in the present case that the defendants' actions constituted an abuse of power "unjustified by any legitimate objective of law enforcement" so as to be barred by the Fourteenth Amendment.

Lewis, 118 S. Ct. at 1713. Petitioners in the present case argue that there was no legitimate need for Deputy Barela's conduct. Pet. 15, 16 n.6. Petitioners maintain that the Court of Appeals focused exclusively on the opportunity for deliberation, rather than upon the state interest in permitting the conduct. Pet. 13. An examination of *Lewis* reveals that the Court of Appeals properly applied its holding.

In *Lewis*, a police officer pursued two boys on a motorcycle who had failed to stop in response to the police officer's commands. The officer chased the motorcycle for seventy five seconds over 1.3 miles in a residential neighborhood, causing two cars and a bicycle to swerve off the road. 118 S. Ct. at 1712. The chase ended after the motorcycle tipped over. The patrol car skidded into one of the boys, killing him. *Id.* The only need of the police officer to apprehend the boys was their refusal to stop. 118 S. Ct. at 1713, *quoting County of Sacramento v. Lewis*, 98 F.3d 434, 442 (9th Cir. 1996). The officer acted in violation of the County Sheriff's Department's order regarding police pursuits. 118 S. Ct. at 1712. This Court in *Lewis*, analogizing sudden police chases to prison riots, wrote:

> Like prison officials facing a riot, the police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made "in haste, under pressure and frequently without the luxury of a second chance." *Id.*, at 320, 106 S. Ct., at 1086; *cf. Graham v. Connor*, 490 U.S., at 397, 109 S. Ct., at 1872 ("police officers are often forced to make split-second judgments — in

> circumstances that are tense, uncertain, and rapidly evolving").

Lewis, 118 S. Ct. at 1720.

In the present case the suspect, Daniel Martinez, did not merely disobey an order to stop, but assaulted Deputy Barela. Deputy Barela was in hand to hand combat with the suspect, rather than chasing him by car. Deputy Barela was fighting for his life and had even less time for deliberation than an officer in his patrol car deciding to chase a suspect. Both are pursuit cases, but the danger to the police officer in the hand to hand combat situation is more immediate.

This Court in *Lewis* recognized:

> [W]hen unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates "the large concerns of the governors and the governed." . . . Accordingly, we hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under Section 1983.

Id. (*citations omitted*). This Court noted that the officer in *Lewis* was faced with a course of lawless behavior for which he was not to blame. He did not cause the boys to speed or to flout the authority of law enforcement officers or encourage them to race through traffic. The precipitating conduct was "practically instantaneous" and the officer's response instinctive. *Lewis*, 118 S. Ct. at 1721. This Court concluded:

> Regardless whether Smith's behavior offended the reasonableness that is held up by tort law or the balance struck in law enforcement's own codes of sound practice, it does not shock the conscience, and petitioners are not called upon to answer for it under Section 1983.

Id.

Just as the officers in *Lewis* had a legitimate interest in apprehending the suspects, Defendant Barela in the present case had a legitimate interest in investigating a crime scene, apprehending Daniel Martinez and winning the fight for control of the gun. Daniel Martinez' actions were as lawless and sudden as the actions of the boys on the motorcycle in *Lewis*. As in *Lewis*, the precipitating conduct of the suspect was practically instantaneous and Deputy Barela's reaction instinctive. The Court of Appeals correctly interpreted the standard set forth in *Lewis*. The Court of Appeals enunciated the *Lewis* standard as follows:

> Henceforth, we look to the nature of the official conduct on the spectrum of culpability that has tort liability at one end. On the opposite, far side of that spectrum is conduct in which the government official intended to cause harm and in which the state lacks any justifiable interest. In emergency situations, only conduct that reaches that far point will shock the conscience and result in constitutional liability. Where the state actor has the luxury to truly deliberate about the decisions he or she is making, something less than unjustifiable intent to harm, such as calculated indifference, may suffice to shock the conscience.

App. 12a. The Court of Appeals properly applied the standard to the facts of this case:

> Deputy Barela was confronted with a suddenly explosive law enforcement situation when Martinez tried to seize Barela's gun with Radecki present. Deputy Barela had no time for deliberation. The undisputed facts in this record make clear that Deputy Barela was confronted with the kind of instantaneous judgment call that is so often required of law enforcement personnel, prison officials, and many other government actors called to emergency situations. Sometimes these decisions are negligent, sometimes they are even reckless, sometimes indifferent. Under these circumstances, however, where Plaintiffs have not even alleged that Deputy Barela acted with an intent to harm the participants or to worsen their legal plight, under the *Lewis* standard there is no constitutional liability.

App. 12a-13a.

Petitioners do not claim that Deputy Barela specifically intended to harm Mr. Radecki. Pet. 18 ("notwithstanding the absence of a specific intent to harm"). Petitioners appear to be advocating a modification of the *Lewis* standard to eliminate the requirement of specific intent to harm in high speed police chase cases and other cases involving emergency situations which do not provide any time for the police officer to deliberate. Petitioners also evidently want courts to focus narrowly on the specific conduct of the police officer, rather than upon the totality of the circumstances, in determining whether the conduct is supported by "any legitimate need." Pet. 18. Such modifications of the *Lewis* standard would once again cause uncertainty and ambiguity in the law. The boys in *Lewis*

refused to stop when commanded to do so by the police officer. Such lawless behavior by the boys supplied sufficient justification for the ensuing police chase. Similarly, in the present case Defendant Martinez' unlawful assault of a police officer justified the ensuing fight and Deputy Barela's desperate plea for help from Mr. Radecki.

Lewis provides a helpful analytical frame work for substantive due process cases. It clarifies the amorphous "shocks the conscience" standard which the District Court in the present case found so difficult to apply. The Court of Appeals properly interpreted and applied the *Lewis* standard. The Petition should be denied.

II.

OTHER CIRCUITS ARE INTERPRETING AND APPLYING *LEWIS* IN THE SAME MANNER AS THE COURT OF APPEALS IN THE PRESENT CASE.

While *Lewis* was decided only recently, it's standard is clear and there appears to be no conflict in the circuits at this time regarding its interpretation and application. In *Schaefer v. Goch*, 153 F.3d 793 (7th Cir. 1998), the Court of Appeals for the Seventh Circuit considered whether the unintentional shooting of a bystander during a standoff between police and the bystander's husband violated the bystander's substantive due process rights. The Seventh Circuit Court of Appeals, citing *Lewis*, recognized that deliberate indifference is not a proper statement of the "conscience - shocking" standard in the context of a high-speed chase, since there is no time for actual deliberation. Although *Schaefer* was not a police chase case, the court determined that the facts were similar to those of *Lewis* in that the police officers "were faced with a dangerous, fluid situation, in which they were forced to make decisions" quickly. *Schaefer v. Goch*, 153 F.3d at 798.

The court in *Schaefer* noted that:

> When government officers face the sort of unforeseen and rapidly changing circumstances that demand unreflective decisions with potentially grave consequences on every side, "even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates [the concerns of substantive due process]."

Id., *quoting Lewis*, 118 S. Ct. at 1720. The *Schaefer* court concluded that although

> firing a gun when an innocent party who has just attempted to surrender is standing, by most accounts, only inches from the intended target seems even more dangerous a course than pursuing a suspect at high speeds through city or suburban streets,

the officers' decision to fire, although regrettable, "[g]iven the high-pressure, life-and-death nature of the standoff" does not shock the conscience. *Id.*, 118 S. Ct. at 798-799. The Seventh Circuit's analysis and application of the *Lewis* standard does not conflict with that of the Tenth Circuit in the present case. *See also Jarrett v. Schubert*, No. 97-2628-GTV, 1998 WL 471992 at 5 (D. Kan. July 31, 1998) ("To help sort through the quagmire, the Supreme Court has adopted a fluctuating standard of review. In emergency situations, a government official will be liable only if he intended to inflict harm on the plaintiff and the government has no justifiable interest in his particular conduct." *Citing Lewis*, 118 S. Ct. at 17-20 and the District Court decision in the present case, 146 F.3d 1227).

The Ninth Circuit Court of Appeals has also interpreted *Lewis* in a manner consistent with the Tenth Circuit Court of

Appeals in the present case. In *Moreland v. Las Vegas Metropolitan Police Department*, __ F.3d __, No. 97-17070, 1998 WL 809551 (9th Cir. Nov. 24, 1998), the plaintiffs alleged that the defendant police officer had inadvertently shot a bystander during a gun fight outside a Las Vegas bar. The court in *Moreland* held that no substantive due process claim under the Fourteenth Amendment arose under the circumstances. In reaching its holding the court in *Moreland* applied the *Lewis* standard. The court stated:

> [T]he argument for application of the "purpose to commit harm" standard is even more compelling [here] than it was in *Lewis*, given the stronger parallels that exist with the prison disturbance context from which this standard was drawn. Indeed, this analogy, which the Supreme Court found "hard to avoid" with respect to police chases, is inescapable in the type of situation addressed here.

1998 WL 809551 at 6 (citation omitted). The *Moreland* court reasoned that the *Lewis* rationale applied "with equal force to the circumstances" faced by the defendant police officer who was responding to a gun fight in progress. *Id.* The police officers were required to act quickly "to address a life-threatening situation." *Id.*

The *Moreland* court noted that its application of *Lewis* conformed with decisions of other circuits. The court wrote:

> [E]ach of the circuits that has interpreted and applied this aspect of the *Lewis* decision has recognized that the critical question in determining the appropriate standard of culpability is whether the circumstances allowed the state actors time to fully consider the potential consequences of their conduct. *See*

> *Armstrong v. Squadrito*, No. 97-2569, 152 F.3d 564, 1998 WL 416887, at 13-20 (7th Cir. July 24, 1998) (applying *Lewis*'s standard of culpability reasoning to a substantive due process claim based on prolonged unlawful detention); *Medeiros v. O'Connell*, No. 97-7355, 150 F.3d 164, 1998 WL 391500, at 6 (2nd Cir. July 15, 1998) (applying *Lewis* in accidental shooting case); *Radecki v. Barela*, No. 96-2297, 146 F.3d 1227, 1998 WL 334490 at 6 (10th Cir. June 24, 1998) (holding that *Lewis*'s "purpose to commit harm" standard applies to all cases involving "emergency situations").

Id. at 7. If the accidental fatal shooting of a bystander in both *Schaefer* and *Moreland* does not "shock the conscience", Deputy Barela's verbal plea to a bystander for help also is not conscience shocking. *See Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) ("[T]here is no constitutional right to be protected by the State against being murdered by criminals and madmen"). As there currently is no conflict among the circuits regarding the *Lewis* standard, the Petition should be denied.

III.

THE PETITION PRESENTS NO ISSUE OF IMPORTANCE OR MAJOR SIGNIFICANCE FOR REVIEW BY THIS COURT.

Essentially the review sought by Petitioners turns solely upon the Court of Appeal's analysis of the particular facts of this case. No legal controversy of importance or direct conflict as to legal issues is presented for review. Petitioners do not contend that an explosive, dangerous situation did not exist or that Deputy Barela intended to harm Mr. Radecki physically, rather they argue that Deputy Barela's conduct was sufficiently

outrageous that it should be considered conscience-shocking in spite of *Lewis*. Petitioners would like to put the clock back to a pre-*Lewis* time when the guidelines for finding a substantive due process violation depended upon a court's subjective view of the level of outrageousness presented. Before *Lewis*, the result often turned upon the phrasing of the issue and the plaintiff's rhetoric. *See* the Memorandum Opinion of the District Court in the present case, App. 23a ("It is fundamentally a factual inquiry: how outrageous was the defendant's conduct?").

Petitioners' yearning for the pre-*Lewis* era is reflected in the cases cited and relied upon by Petitioners. *Pinder v. Johnson*, 54 F.3d 1169, 1178 (4th Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 994, 116 S. Ct. 530, 133 L. Ed. 2d 436 (1995), cited by Petitioners shows the difficulty in assessing the level of outrageousness of the facts. Initially the Fourth Circuit in *Pinder* found an actionable Section 1983 claim had been pled against a municipality and a police officer for releasing from custody the former boyfriend of a mother after a domestic violence arrest, enabling the boyfriend to return and burn down the mother's home killing her children while she was at work. However, after an *en banc* review by the Fourth Circuit, that court withdrew its earlier opinion and concluded that there was "no actionable 1983 claim", because no duty to protect existed in those circumstances and the law was not clearly established. In a clearly difficult decision, the Court wrote,

> It cannot be that the state "commits an affirmative act" or "creates a danger" every time it does anything that makes injury at the hands of a third party more likely . . . no amount of semantics can disguise the fact *that the real "affirmative act" here was committed by Pittman, not by Officer Johnson.*

54 F.3d at 1175 (emphasis added). So too here, the real "affirmative act" was Daniel Martinez shooting Mr. Radecki in cold blood after he won the struggle for Deputy Barela's gun, not Deputy Barela's cry for help during that struggle.

Petitioners ignore that Deputy Barela had no time to deliberate. They cite to pre-*Lewis* cases in which the defendants acted in non-emergency settings. *See, e.g., Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938, 111 S. Ct. 341, 112 L. Ed. 2d 305 (1990) (police officer arrested driver of car, impounded the car and left female passenger alone in the early hours of the morning in a high crime area where she was raped by a third party; applied standard of deliberate indifference); *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), *cert. denied*, 508 U.S. 951, 113 S. Ct. 2442, 124 L. Ed. 2d 660 (1993) (Defendants placed a registered nurse alone with a known violent sex offender who subsequently kidnapped and raped her; applied standard of deliberate indifference); *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) (Police officers arrested driver of vehicle and left young children stranded on the roadway; applied standard of gross negligence or reckless disregard). Not only do these cases apply differing standards of culpability, but none of them represent situations where the police officers are forced to make split second judgments in tense, uncertain and rapidly evolving circumstances. *See Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1089).

IV.

THE LAW WAS NOT CLEARLY ESTABLISHED AND RESPONDENTS ARE ENTITLED TO QUALIFIED IMMUNITY.

The Court of Appeals in the present case did not reach the second prong of the qualified immunity analysis established

by *Siegert v. Gilley*, 500 U.S. 226, 231-33, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991). This Court held in *Siegert* that a court should analyze a defense of qualified immunity by determining first whether a deprivation of a constitutional right has been alleged. If the plaintiff has stated a claim for deprivation of a constitutional right, only then should a court determine whether the right implicated was clearly established at the time of the defendant's conduct. The Court of Appeals did not go beyond the first step of *Siegert*. It determined that Petitioners had failed to state a substantive due process claim. If the Court of Appeals were to reach the second step of the qualified immunity analysis, it is likely that the case would still result in judgment for Respondents.

The history of this case amply demonstrates that the law was not clearly established in August of 1992, so that a reasonable police officer in Deputy Barela's place would have known that his conduct was unlawful in light of pre-existing law. *See Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987). In August of 1992, it was clear that a person had no constitutional right to governmental protection from private violence with the exception of certain limited circumstances where the individual has a "special relationship" with the state. *DeShaney v. Winnebego County Dept. of Social Services*, 489 U.S. 189, 109 S. Ct. 998, 1003-4, 103 L. Ed. 2d 249 (1989) ("[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guaranty of certain minimal levels of safety and security.") Approximately four months prior to the incident at issue in the present case, the Tenth Circuit held that a police officer could be liable for injuries to a bicyclist caused by a suspected felon who was being recklessly pursued in an automobile chase by police officers. *See Medina v. City and*

County of Denver, 960 F.2d 1493, 1496 (10th Cir. 1992). *Medina* has now effectively been superceded by *Lewis* and is no longer good law.

While the present case was on appeal for the first time to the Tenth Circuit Court of Appeals, the Court of Appeals decided in *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995), *cert. denied*, 516 U.S. 1118, 116 S. Ct. 924, 133 L. Ed. 2d 853 (1996), that for a plaintiff to prevail on a substantive due process claim against an individual police officer, the plaintiff must demonstrate that the officer acted in a manner that "shocks the conscience." *Id.* at 571. *Uhlrig* followed this Court's reasoning set forth *in Collins v. City of Harker Heights*, 503 U.S. 115, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992). The Court of Appeals remanded this case to the District Court to reconsider whether Deputy Barela's conduct met the "shocks the conscience" standard of *Collins* and *Uhlrig*. The District Court again denied qualified immunity to Deputy Barela, holding that *Medina* clearly established that Deputy Barela's conduct was unconstitutional.

While this case was pending before the Court of Appeals for the second time, this Court decided *Lewis*. Certiorari was granted by this Court in *Lewis* "to resolve a conflict among the circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case." *Lewis*, 118 S. Ct. at 1713. Prior to *Lewis*, the standard of culpability for a substantive due process case was not clearly established either among the circuits or within the Tenth Circuit itself. The pre-*Lewis* law in this area of state-created-danger hardly serves to illuminate the "apparent unlawfulness" of Deputy Barela's single cry for help sufficient to satisfy the particularized articulation requirement of *Anderson v. Creighton*. 483 U.S. at 640. Thus, even if this Court were to grant the Petition and reverse the Court of Appeals, it

is likely that the result would remain the same, for the law was not clearly established. Deputy Barela would still be entitled to qualified immunity.

CONCLUSION

The Petition for Writ of Certiorari should not be granted, therefore, since the Court of Appeals correctly interpreted and applied *Lewis*. Petitioners' argument is essentially a factual dispute regarding the level of outrageousness of the facts which does not warrant review by this Court. The conflict among the circuits over the standard of culpability has largely been resolved by *Lewis*. It is unlikely that the granting of the Petition would change the judgment in favor of Respondents. In any event, Respondents are entitled to qualified immunity as the law was not clearly established at the time.

Respectfully submitted,

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